

June 19, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0011 -- Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities: **Prepaid Accounts Rule**

Dear Acting Director Mulvaney,

The forty-two undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its adopted regulations and new rulemaking authorities. **In these comments we urge you not to revisit or delay the prepaid accounts rule (Regulations E and Z) that is scheduled to go into effect in 2019.** We have joined other comments on other regulations.

The Bureau invested considerable time and effort in research, outreach, and consideration of public input in formulating the prepaid rule. We note that there are numerous suggestions from consumer organizations that the bureau did not follow. On the other hand, the bureau made many changes to accommodate industry concerns, including two rounds of amendments and delays in the effective date.

While neither we nor anyone else got everything we wanted in the rule, it is time for it to go into effect and not to further delay or complicate implementation of the important protections the rule provides.

We especially urge you not to revisit the Regulation Z rules governing overdraft credit features. The bureau should have banned overdraft fees altogether, but the rules do prevent unaffordable features that add high fees to cards aimed at credit-impaired consumers.

While we urge you not to reopen the rule, we do make some suggestions below regarding additional guidance that may be helpful to clarify whether safe bank accounts ("checkless checking") are covered and to prevent evasions of the rule by accounts offered by nonbank entities that could pose as checkless checking.

1) The prepaid rule provides important protections

The CFPB's prepaid account rule is an important, common sense rule that provides clear fee disclosures, access to account information, fraud and error protection, and protection against inappropriate and dangerous overdraft and credit features for this rapidly growing market. The rule brings prepaid accounts out of the shadows and recognizes the important role they play in

bringing access to banking services to underserved communities. The rule has been widely supported, with few exceptions, in both consumer and industry circles.

Each of the core elements of the rule provides important protections:

Prepaid cards and mobile versions will receive the same basic protection from fraud, unauthorized charges and errors that debit cards receive today. The payment landscape is changing rapidly, but the need for protections against fraud and errors is critical regardless of the way money is held and moves. The rule appropriately uses a broad and flexible definition of “prepaid accounts,” including physical plastic cards and funds in newer types of mobile or internet-based accounts. This flexibility allows the rule to evolve and not to become outdated the moment it is finalized. An overly rigid view of the “accounts” that were covered under the 1974 Electronic Fund Transfer Act (EFTA) kept prepaid cards unprotected for far too long. The CFPB made accommodations to industry concerns about consumer fraud by providing an exception from the requirement for provisional credit until the card is registered.

Consumers will receive a simple, uniform fee chart so they can avoid hidden fees and comparison shop. A short chart of key fees will be on the outside of the package and provided online before purchase. More details are on a longer chart inside the package and online at the URL provided on the package. The CFPB engaged in consumer testing of model forms and balanced a number of competing concerns in designing the short- and long-form disclosures. The CFPB designed these disclosures to be ones that consumers actually see, understand and use, not merely fine print that meets a technical disclosure requirement.

The uniform format and required elements are essential to ensure that consumers will see the fees that they are most likely to incur and that they will be able to comparison shop across different products that can be used to hold funds and make payments. Yet the requirements also provide flexibility and deter manipulation by requiring that other fees be disclosed on the short-form for particular companies if they generate a high amount of revenue. While it is not possible to design a single form that perfectly achieves uniformity, consumer awareness, relevance, flexibility and fair competition across a number of different products and services, the CFPB has done a remarkable job of balancing different concerns and achieving those goals.

The package will warn consumers if the funds do not have deposit insurance. Most prepaid accounts have FDIC or NCUA insurance, but those that do not must carry a statement on the outside of the package. The statement will provide important information to consumers about the safety of their funds if the company fails and will encourage providers to obtain deposit insurance.

Basic account information will be free. In exchange for relief from the EFTA requirement of periodic statements, the prepaid account provider must provide key account information for free. Balances must be available by telephone without charge. Transaction information going back 12 months must be free online. Transaction information for the previous 24 months may be requested up to once per month without charge. Issuers may charge for regular monthly

paper statements. These rules relieve the burden on institutions of mailing regular monthly statements while ensuring that consumers can easily obtain key information about their accounts without charge.

The rule protects choice of how to receive funds for employees and government benefit recipients. If an employer uses payroll cards or a government agency pays non-needs-tested benefits through a prepaid card, it must first give employees or benefit recipients fee information and a choice about how to receive the funds. If the consumer does not choose another pay method, the payroll or benefit card must come with a clear fee disclosure and a statement that the person does not have to accept the card and can ask about other options. These rules fulfill the statutory requirement of the EFTA that no person may be required to have an account at a particular institution as a condition of receipt of wages or government benefits. The rules protect people from high-fee cards and make sure that they have a choice of how to receive their money in the way that is affordable and works best for them.

Cards with credit features will appropriately comply with credit laws to protect people from unaffordable and deceptive overdraft features. Cards that have overdraft or credit features must disclose that fact on the package. That is a critical piece of information, as many consumers choose prepaid accounts precisely because they wish to avoid problems with overdraft fees and credit. If the card has a credit feature (even if optional), the rule appropriately requires compliance with the laws governing credit, including the rules that govern other credit cards. The creditor must determine that the consumer is able to repay the credit. Fees in the first year are limited to 25% of the credit line but there is no limit on the interest rate. Payments may be due no more frequently than once a month, 21 days after a statement (which may be electronic). The creditor cannot require the consumer to let the creditor take payments automatically out of the account, but consumers may choose to pay automatically. These protections appropriately apply to any prepaid account that is linked to a credit feature, even if that feature is styled as overdraft protection, which is a form of credit. This issue is discussed in more detail below. The CFPB worked to relieve regulatory burden by providing an exception sought by providers of mobile wallets that do not store funds and that may contain credit cards that already comply with credit laws.

Fees will be more transparent and competition will lower fees by having fee schedules publicly available on the company's website and online at the CFPB. Consumers who are comparison shopping, online sites that help consumers find accounts, and researchers who are analyzing the prepaid market will be able to find fee information easily. Sunshine will promote competition and will lower fees.

2) The prepaid rule should go into effect as scheduled and should not be revisited at this time.

Consumers have waited far too long for protections for prepaid accounts. Prepaid cards have been around for more than a decade without the basic protections that debit cards receive. The effective date – originally a full year after finalization of the rule – has been twice delayed, and

the current April 1, 2019 effective date is into the fifth year since this rulemaking began. The rule must go into effect as scheduled with no further extensions or changes.

The CFPB has already twice amended the rule to address industry concerns about unintended effects. Those amendments caused further delays and impacted industry efforts to change systems to comply with the rule. The CFPB has already gotten extensive input at several stages of this rulemaking process, including after the rule was initially final.

Any further delays or changes would harm both consumers and the prepaid industry. Consumers would have to wait even longer for essential protections and would risk losing protections if the rule is weakened. Industry participants are deep into efforts to comply with the rule; indeed, many were already ready to comply with the April 1, 2018 effective date. Any changes, however minor, will require that compliance systems be revisited and will burden industry. Even changes that appear to impact only a small slice of the market could impact business strategies and features in other parts of the market.

We especially urge the CFPB to reject any calls to revisit or eliminate the requirements for cards that have credit features, including overdrafts. As we explained at greater length in our original comments,¹ overdraft fees have absolutely no place on prepaid cards. While 98% of prepaid cards are true to their purpose and are actually “prepaid,” a few cards, primarily payday lender prepaid cards and a small number of payroll cards used by low-wage employers, have overdraft fees. These cards exploit the struggling consumers who turn to prepaid cards to control their expenses.

Contrary to the claim that overdraft features help consumers make ends meet at the end of the month, the cycle of overdrafting leaves consumers with *less liquidity* at the end of the month, not more. Studies have shown that consumers who opt in to overdraft “protection” frequently overdraft repeatedly to cover the hole from the previous overdraft, with many paying an average of one overdraft fee every month.² Overdraft features simply mean a cycle of overdrafting with more fees and less money.

¹ See Comments of Americans for Financial Reform et al on proposed prepaid card amendments to Regulation E, Docket No. CFPB-2014-0031 or RIN 3170-AA22 (Mar. 23, 2015), <http://ourfinancialsecurity.org/wp-content/uploads/2015/03/AFR-March-2015-Comment-Letter-to-CFPB-on-Prepaid-Cards-1.pdf>.

² The studies both focused on NetSpend’s general use prepaid cards, which have \$15 overdraft fees, compared to the \$25 overdraft fees that NetSpend has on its Skylight payroll cards used in Kansas and Missouri. The first study found that consumers who used the overdraft service paid an average of \$14.62 per month more in fees for their accounts than other consumers. See Fumiko Hayashi & Emily Cuddy, Fed. Reserve Bank of Kansas City, “General Purpose Reloadable Prepaid Cards: Penetration, Use, Fees, and Fraud Risks,” Table 5.2 at 68 (Feb. 2014) (“Kansas Fed, GPR Report”), <http://www.kc.frb.org/publicat/reswkpap/pdf/rwp14-01.pdf>. The second study, which focused on a narrower category of consumers who had more regular income, found that the median consumer who opted in to overdraft protection paid \$9.12 per month in overdraft fees (or 7.3 overdraft fees per year), and that a quarter of overdrafters paid a minimum of \$14.84 per month in overdraft fees (11.9 overdraft

Fidelity to the statutory requirements of the Truth in Lending Act (TILA) requires that overdraft features be covered as credit under Regulation Z. Overdraft credit meets the clear definition of credit under TILA. The exemption that the Federal Reserve Board adopted over a decade ago was aimed at the truly occasional courtesy of covering a check written previously that would otherwise bounce, not automated credit features triggered in real time on transactions that could otherwise be denied with no fee.³

That narrow TILA exemption has exploded in the bank account market into a huge loophole that has created enormous problems. The most vulnerable consumers pay hundreds if not thousands of dollars that they need for expenses and many lose their bank accounts altogether. The fees also pose problems for banks, distorting the pricing of bank accounts, creating conflict and confusion with consumers, making it difficult for banks that do not push back-end fees to compete with a clear, up-front price, and causing banks to become accustomed to a business model driven by abusive overdraft fees.

While the CFPB should have banned overdraft fees altogether on prepaid accounts, it appropriately declined to expand an exemption loophole in Regulation Z to a new market that was not yet wedded to overdraft fees. There is only one major prepaid company, NetSpend (a subsidiary of TSYS) that has overdraft fees, and only about 2% of cards in the CFPB's study have overdraft fees. Prepaid cards are the product that consumers turn to after they have problems with overdraft fees or have lost their accounts altogether. Overdraft fees on bank accounts are the reason the prepaid industry exists.

It would harm not only consumers but also the prepaid industry to change the rule in any way that made overdraft fees more allowable. Back-end overdraft fees would distort pricing and undermine the CFPB's efforts to make prices transparent – just like overdraft fees have made it difficult for banks to charge an honest monthly fee and have led most to offer deceptively named “free checking” that is supported by overdraft revenue. Loosening the rules on overdraft fees would also disadvantage companies that charge an honest up-front price and treat vulnerable customers right. For example, Steve Streit, the CEO of Green Dot, told investors: “our strong conviction is that charging overdraft fees, and especially charging such fees to low-income Americans, is wrong. And so for that reason, Green Dot does not do it.”⁴ Yet, before the CFPB rules were finalized, Green Dot was getting pressure from investors to add overdraft fees.

The prepaid rules will encourage companies to develop savings and budget tools, not to push people into spending more than they have and overdrafting. The rules do not stop people from

fees per year). See Fumiko Hayashi and Emily Cuddy, Federal Reserve Bank of Kansas City, “Recurrent Overdrafts: A Deliberate Decision by Some Prepaid Cardholders?” (October 2014) (“Kansas Fed, Recurrent Overdrafts”), <http://www.kansascityfed.org/publicat/reswkpap/pdf/rwp14-08.pdf>.

³ See 69 Fed. Reg. 31,760, 31,761 (June 7, 2004).

⁴ Transcript, GDOT-Q2 2013 Green Dot Corporation Earnings Conference Call (July 30, 2013).

being offered credit, and do not even prevent credit from being loaded onto or linked to a prepaid card, as long as the consumer affirmatively accesses the credit first rather than drawing on it indirectly through overdrafts. Indeed, the CFPB rejected our recommendation to strengthen the proposed rule by covering all linked credit and instead narrowed the credit products covered in the final rule.

The credit provisions in the rule are a compromise that should be left intact and not weakened further.

We also urge the bureau to reject any call to narrow the definition of “prepaid account” in order to exempt newer fintech products. The CFPB wisely designed a rule that would not be outdated before it even took effect. The rule appropriately covers not only physical plastic cards but also newer forms of prepaid accounts that operate online and through mobile devices. Whatever form the prepaid account takes, consumers need to understand the fees, have access to account information, receive basic protection against unauthorized charges and errors, and be covered by credit protections when credit is extended. The CFPB has already amended the rule to address concerns raised by mobile wallet providers and it is time to allow the rule to go into effect.

3) The CFPB should provide guidance on the distinction between safe bank accounts (“checkless checking”) and prepaid accounts to provide clarity to industry and avoid evasions.

While we do not believe that further amendments to the prepaid rule are necessary at this time, it would be helpful to provide more guidance on the distinction between the safe bank accounts aka “checkless checking” accounts that are not covered by the rule, and prepaid accounts, which are.

This is important for two reasons. First, banks that have long offered safe bank accounts that they did not view as prepaid accounts are seeking clarity. Second, it is essential that prepaid accounts not be allowed to evade the prepaid rule simply by styling themselves as checkless checking accounts.

As discussed in greater detail below, the only type of “checkless checking” accounts that should be allowed to be considered “checking accounts” exempt from the rule are ones that:

- Meet the core standards for safe accounts: no overdraft or nonsufficient funds (NSF) fees;
- Are individual demand accounts offered, opened and serviced directly at a bank or credit union;
- Are available through the financial institution’s branches.

All of these elements, not just the second, are necessary to avoid evasions and to limit any exemption to bank accounts that were long offered directly by financial institutions in full compliance with Regulation E.

The prepaid rule does not cover an account (other than a payroll card account, government benefit card account, or account labeled or marketed as “prepaid”) that is “a checking account, a share draft account, or a NOW account.”⁵ The CFPB’s Small Entity Compliance Guide states:

Checking accounts, share draft accounts, and NOW accounts are not prepaid accounts under this prong of the definition even if they do not offer check-writing capabilities (e.g., a “checkless” checking account). For purposes of this test, the ability to issue preauthorized checks drawn on the account does not by itself qualify the account as a checking, share draft, or NOW account.⁶

This guidance document is not a rule and does not change the requirements of the rule. But it does create the potential for confusion and evasion if prepaid cards simply start calling themselves checkless checking to avoid the rule.⁷

Any interpretation that the term “checking account” covers an account without checks must be construed very narrowly to avoid gutting the rule. At best, the term must be limited to safe bank accounts that have long been offered directly by financial institutions, in full compliance with Regulation E (not the payroll card rules), as a way to avoid the problems that checks pose with their overdrafts and overdraft fees.

On January 1, 2011, the FDIC launched a Model Safe Accounts Pilot. The pilot was a case study designed to evaluate the feasibility of financial institutions offering safe, low-cost transactional and savings accounts that are responsive to the needs of underserved consumers. The FDIC developed a Model Safe Accounts Template.⁸ The most central element of the template is that the accounts can have “No overdraft or NSF fees.”

Although prepaid cards already existed at the time of the FDIC pilot program, the program was only for accounts offered directly by insured financial institutions. Nine financial institutions participated in the pilot:

⁵ 12 CFR 1005.2(b)(3)(i)(D)(3).

⁶ *Prepaid Rule, Small Entity Compliance Guide* at 12, 13 (June, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_prepaid-small-entity-compliance-guide.pdf. See also 81 Fed. Reg. 83974 (Nov. 22, 2016).

⁷ In addition to payroll cards, government benefits cards, and accounts marketed or labeled as prepaid, the rule defines a prepaid account as an account:

“(1) That is issued on a prepaid basis in a specified amount or not issued on a prepaid basis but capable of being

loaded with funds thereafter,

“(2) Whose primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services, or at automated teller machines, or to conduct person-to person transfers, and

“(3) That is not a checking account, share draft account, or negotiable order of withdrawal account.” 12 C.F.R. § 1005.2(b)(3)(i)(D) (effective April 1, 2019).

⁸ <https://www.fdic.gov/consumers/template/template.pdf>.

Bath Savings Institution
Citibank
Cross County Savings Bank
First State Bank
ING DIRECT
Liberty Bank and Trust Company
Pinnacle Bank
South Central Bank
Webster Five Cents Savings Bank

All of the accounts were individual demand deposit accounts.

Building on the FDIC Pilot Program, on October 27, 2015, the Cities for Financial Empowerment Fund launched updated Bank On National Account Standards.⁹ The standards support local Bank On coalition efforts to expand access to safe and appropriate financial products and services through low-cost, low-fee, no-overdraft financial products.¹⁰ While the Bank On standards encompass both checkless checking accounts and prepaid accounts, among the required features are:

- Transaction account at a banking institution
- No overdraft or NSF fees; structurally not possible
- Free and unrestricted branch access for customer service
- Free in branch deposit capability
- Free paper monthly statements (or electronic with consumer consent)¹¹

Several accounts have now been certified as meeting these standards, and the accounts are available at all branches of these financial institutions:

Bank of America Safe Balance Banking Account
First Commonwealth Bank SmartPay Card
First National Bank Access Debit Account
Chase Liquid
KeyBank Hassle-Free Account
Citi Access Account
U.S. Bank Safe Debit Account

⁹ http://joinbankon.org/wp-content/uploads/2017/05/CFE-Fund_Bank-On-2017-NAS-Press-Release-final.pdf.

¹⁰ See Ian McKendry, American Banker, Big Banks Sign On to Safer Account Standards for Underserved (Oct. 27, 2015).

¹¹ Cities for Financial Empowerment Fund Bank On National Account Standards (2017-2018), <http://joinbankon.org/wp-content/uploads/2017/05/Bank-On-National-Account-Standards-2017-2018-final.pdf>.

Dart Bank Bank On Checking Account
Wells Fargo EasyPay Card
Independent Bank IntroChecking Account
Iberia Bank Ability Banking Account
Old National Bank EZ Access Checking Account
The First, A National Banking Association First AID Checking Account¹²

Some of these accounts, such as the Wells Fargo card, are styled as prepaid cards, but most are styled as bank accounts.

These safe bank accounts have been in development for many years as a way to help people avoid overdraft fees and access safe bank accounts. They were not created as a device to evade the prepaid rule. These individual accounts have long complied with Regulation E. They do not have any features that bring them within the scope of the Regulation Z provisions of the prepaid rule as the accounts do not offer any form of credit feature.

These safe bank accounts could benefit from the simple and uniform fee disclosures provided in the rule, and we have no objection to covering checkless checking accounts under the prepaid rule. But our primary concern is to ensure that any accommodation for these accounts not turn into an evasion used to permit overdraft fees on prepaid cards.

The mere use of a debit card bank identification number (BIN) and an individual rather than pooled account structure is not a basis to avoid the requirements of the prepaid rules. That distinction has no basis in the prepaid rule. It is also a distinction that is invisible and immaterial to the consumer and does not change the need for the protections under the rule. Nor does the use of a debit card BIN and individual account, standing alone, make an account that does not have traditional checks a “checking account” that is exempt from the rule.

“Checkless checking” accounts should only be considered “checking accounts” if they meet the criteria for the traditional safe bank accounts that banks have long offered in compliance with Regulation E. The CFPB should issue guidance to make clear that an account without checks can be considered a “checking account” only if:

(1) It is solely offered and marketed by a financial institution, including through all of its branches, not through nonbank entities. An account that is designed, marketed, offered or serviced by a company in the prepaid business is not a checking account. Nor is a card that is issued by a bank but is not offered in its branches and instead is marketed and serviced by a nonbank entity.

(2) The account is a safe bank account does not have overdraft fees or NSF fees. Any checkless checking account that can have overdraft fees is an evasion product. Banks did

¹² <http://joinbankon.org/coalitionmap/>.

not offer such accounts outside of the prepaid card business prior to promulgation of the overdraft rule.

(3) The account is not a prepaid card as defined in Regulation II (which requires prepaid cards to have limited functionality, with funds accessible solely through the card, in order to be exempt from the limits on interchange fees). Bank prepaid cards are still clearly prepaid cards.

Any broader interpretation that allows accounts without checks to be considered “checking accounts” opens up a wide loophole that will swallow the prepaid rule and eviscerate the careful protections the CFPB has adopted.

Thank you for considering our comments.

Yours very truly,

Allied Progress
Americans for Financial Reform
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
Brooklyn Coop Federal Credit Union
Center for Economic Integrity
Center for NYC Neighborhoods
Center for Responsible Lending
Connecticut Legal Services, Inc.
Consumer Action
Consumer Advocacy and Protection Society (CAPS)
Consumer Federation of America
Consumers Union
East Bay Community Law Center
Florida Alliance for Consumer Protection
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc.
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
Montana Organizing Project
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center, on behalf of its low-income clients
National Consumers League
National Fair Housing Alliance

The One Less Foundation
People's Action Institute
Public Good Law Center
Public Justice Center
Public Law Center
Reinvestment Partners
Tennessee Citizen Action
Texas Appleseed
Tzedek DC
U.S. PIRG
Virginia Poverty Law Center
West Virginia Center on Budget and Policy
Woodstock Institute
World Privacy Forum